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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND SUPPORTING BRIEF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioner, Shoshone Tribe of Indians of the Wind River Reservation in Wyoming, prays that a writ of certiorari issue to review the judgment of the Court of Claims in this case rendered December 2, 1935.

The Shoshone Tribe of Indians have ever been friendly to the citizens and loyal to the Government of the United States (Finding 4, R. 36). They have been deprived of the use of, and finally of the title to, an undivided half of their Treaty Reservation, the fairest portion of Wyoming, unlawfully and without compensation. The findings and opinion of the Court of Claims recognize and establish the

wrong done the Shoshones. But it is believed that the legal conclusions drawn by the Court from the facts found have resulted in an entirely inadequate award of compensation.

Statement of Matter Involved.

Prior to 1868 the Shoshone Tribe held under Treaty (18 Stat. 685, 2 Kappler, 848,) 44,672,000 acres of land in Colorado, Utah, Idaho and Wyoming. Their title was not disputed (Finding 1, R. 31).

Upon the close of the Civil War the transcontinental railroads, authorized by act of Congress, were in course of construction from the Missouri River westward to the Pacific. They were obliged to cross vast tracts in possession of Indian tribes, one of such tracts being the above-mentioned Shoshone Treaty lands. To meet this situation Congress enacted the Indian Peace Commission Act of July 20, 1867 (15 Stat. 17). It was necessary under the land-grant to the Union Pacific Railroad to clear title to a strip of land through the heart of the Shoshone domain 40 miles wide and over 400 miles long. The Peace Commission met with the Shoshones at Fort Bridger. By the Treaty of July 3, 1868, (15 Stat. 673, 2 Kappler, 1020), upon which this suit is based, the Shoshones relinquished the vast domain theretofore held by them and accepted in lieu thereof the reservation involved in this cause. This reservation contained originally 3,054,182 acres and comprises the fairest and best watered portion of the State of Wyoming (Finding 5, R. 38). The Treaty contains the following provisions (Finding 2, p. 33, 36):

> "ARTICLE 2. * * * The United States further agrees that the following districts of country, to-wit: * * * (describing boundaries) * * * shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein

named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with consent of the United States, to admit amongst them; and the United States now solemly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid."

(NOTE.—This language did not include the Arapahoe Indians.)

"ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; * * *

Provisions substantially identical with the foregoing appear in all of the great treaties made by the Indian Peace Commission (Opin., R. 70).

The Shoshone Tribe promptly thereafter located upon this reservation and has ever since remained thereon and kept and observed all of the provisions of said treaty (Finding 6, R. 40).

In the Winter of 1877-1878, the Northern Arapahoe band of Indians, which had been at war with the Government of the United States, was brought from western Nebraska, under military escort, to and upon the Shoshone Reservation under the promise of the Indian Office officials that they would be removed therefrom the following year and

located upon a reservation of their own at a place in Wyoming called Red Buttes near the mouth of the Sweetwater River (Finding 10, R. 43). They were never removed (Finding 10, R. 50). The Shoshones, from time to time, protested vigorously and appropriately against the presence of the intruders on their reservation and demanded their removal (Finding 10, R. 50). Their protests were ignored by officials of the Indian Office, and on August 13, 1891, the Commissioner of Indian Affairs, in writing, advised that (Finding 11, R. 50):

> "This office holds * * * that the Arapahoes have equal rights to the land on said reservation which does not depend upon the further consent of the Shoshones, * * *"

The above was the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe band of Indians upon the Shoshone Reservation (Finding 11, R. 50). Thereafter the Shoshones continued their protests against the presence of the Arapahoes on the reservation and have continued to protest down to the present date (Finding 10, R. 45, 48, 49, 50; Finding 11, R. 50; Findings 14-15, R. 53; Opin., R. 73).

The Jurisdictional Act of March 3, 1927 (44 Stat. 1349), printed in full in the Amended Petition (R. 1-3), conferred jurisdiction upon the Court of Claims, with right of appeal to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe may have against the United States arising under or growing out of the Treaty of July 3, 1868. The Act further provided:

> "In reference to all claims which may be the subject-matter of the suits herein authorized, the decree of

> the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands or other property."

This is the only act ever passed by Congress pertaining to taking of title to the lands in suit (Finding 11, R. 51).

Pursuant to this Statute the Shoshones brought the present suit to recover just compensation for the taking of the temporary use and occupancy of an undivided half of their reservation by the United States for the use of the Arapahoes, and to recover just compensation for the permanent taking of the title to an undivided half interest in said reservation by the United States for the benefit of itself and the Arapahoe Tribe.

The Court of Claims held that the matter of permanent location of the Arapahoes upon the Shoshone Reservation had never been presented to the Shoshones (Finding 10, R. 48); that the Shoshones had never consented to the permanent location of the Arapahoes upon the Shoshone Reservation (Finding 10, R. 45); that there had been a use and a taking of an undivided half interest in the Shoshone's Reservation by the United States and that the permanent taking was effectuated by the 1891 letter of the Commissioner of Indian Affairs (Finding 11, R. 50; Opin., R. 78). The Court allowed the Shoshones at the rate of $1.75 per acre for an undivided half interest in the 2,343,540 acres comprising the reservation in 1891, amounting to $2,050,597.50 (Finding 16, R. 53; Opin., 78-79). The Court also allowed for the use and occupancy of said undivided half from 1878 to 1891, by approximately 1000 Arapahoe Indians, at the rate of $25.00 per Indian per year, amounting to $332,475 (Finding 16, R. 53); Opin,, R. 82). The Court made other minor allowances, making the

total which it found the plaintiff entitled to recover, $2,483,467.99 (R. 68).

Against the above recovery the Court awarded the United States on its counterclaim for gratuities, $1,689,646.50 (R. 68).

The Court adjudged that the plaintiff recover from the United States the difference between the above amounts, viz., $793,821.49 (R. 68).

Reasons Relied Upon for Allowance of the Writ.

1. The Court of Claims erred in its holding that the letter of the Commissioner of Indian Affairs of August 13, 1891, constituted a permanent taking of an undivided half interest in the Shoshone's Treaty Reservation. Petitioner contends that an interest in the Shoshone's Reservation could be acquired only:

> 1. In the manner provided by Article 11 of the Treaty, viz., by signature of a majority of the adult males; or
>
> 2. As provided in Section 2116, R. S.

2. The compensation allowed by the Court of Claims for temporary use and occupation of an undivided half interest in the Shoshone Treaty Reservation from 1878 until the permanent taking of said undivided half interest, viz., $25,000 per year is, as a matter of law, inadequate. The Court found the value of the undivided half interest in 1891 to be a little over $2,050,000. A return of 4% per annum on this amount would be $82,000 per year, which is the minimum to which, in view of the Court's findings as to the desirability of the Shoshone Reservation as a place for the Government to keep the Arapahoes, the Shoshones should be entitled. The Court of Claims allowed nothing by way of addition to the value of the use taken, at the time

of taking, to produce the present full equivalent of that value paid contemporaneously. Just compensation is not rendered by paying, many years after the taking, merely the value of the property at the time of taking.

3. The Jurisdictional Act provides that the judgment shall extinguish the title of the Shoshones to the property taken. This is the first and only declaration by Congress, or by any one authorized to represent the United States, of an intent to take permanently an interest in the Shoshone's Reservation. Plaintiff contends that the taking of the title to an undivided half interest in their Treaty Reservation occurred upon the passage of the Jurisdictional Act of 1927 and the bringing of this suit thereunder and that the value should be fixed as of 1927, together with interest thereon from that date as a part of just compensation.

4. However, should this Court conclude that the permanent taking of the undivided half of the reservation was accomplished by the Commissioner's letter of 1891, then, and in that event, there should be added to the value so found such sum as will produce the present full equivalent of that value paid contemporaneously. Interest at a reasonable rate is a proper and convenient method of ascertaining the amount to be added.

The Order of the Court of Claims of June 1, 1936, overruling the motions for new trial, both of petitioner and of the United States, states (R. 99):

> "If, under all of the facts and circumstances as disclosed by the record and the history of this case from 1878, when the Arapahoes were brought to and placed upon the Shoshone Reservation over the objection of plaintiff, any wrong or injustice has been done in the disposition that the court has made of the matter, it was against the plaintiff in the conclusion that the Shoshone property was actually and legally taken in 1891

instead of 1927, in the value given to the Shoshones for the property taken from them, and in not allowing interest as a part of the measure of compensation. * * *

"If the court had been dealing with similar questions between private parties or between the Government and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

Petitioner submits that the court below has decided an important question of law in conflict with the weight of authority. The questions presented are of substance relating to the application of the Constitution to a treaty of the United States.

The Jurisdictional Act provides:

"With right of appeal to the Supreme Court of the United States by either party, * * *"

While under the decisions of this Court since the Act of February 13, 1925, relating to review of decisions of the Court of Claims the above quoted language of the Jurisdictional Act is not relied upon as granting the absolute right of review, yet it is believed that the language indicates the importance which Congress attached to the case and the intent that same should be ultimately passed upon by this tribunal.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims, commanding that Court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket, No. H-219, Shoshone Tribe of Indians of the Wind River Reservation in Wyoming,

plaintiff, *vs.* The United States of America, defendant, and that the said judgment of the Court of Claims may be reversed by this Court with appropriate directions, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper; and your petitioner will ever pray.

SHOSHONE TRIBE OF INDIANS OF THE
WIND RIVER RESERVATION IN WYOMING,
By GEORGE M. TUNISON,
Counsel for Petitioner.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the Court of Claims together with its special findings of fact and conclusion of law are in the printed record beginning at page 30. The opinion is not yet reported.

Jurisdiction.

The jurisdiction of the Court is invoked under Section 3 (b) of the Act of February 13, 1925; Title 28, Section 288, Subsection (b) U. S. Code Annotated.

Jurisdiction is also invoked under the provisions of the Jurisdictional Act under which this suit was brought, printed in full in the Amended Petition (R. 1-3), which Act provides:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, * * *."

The case was decided December 2, 1935 (R. 30). Motions for new trial were overruled in a Memorandum and Order June 1, 1936 (R. 98).

Statement of the Case.

The case is stated in the Petition. *Ante.*

Specification of Errors.

I.

The Court erred in holding as a matter of law, in substance and effect, that an undivided half interest in the Shoshone's Treaty Reservation was permanently taken

from the Shoshone Tribe by the United States on August 13, 1891, by virtue of the letter and holding of the Commissioner of Indian Affairs of said date, in which the Commissioner stated (Finding 11, R. 50; Opin., R. 78):

> "This office holds • • • that the Arapahoes have equal rights to the land on said Reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding."

Authorities.

Article 11 Shoshone Treaty, July 3, 1868, 15 Stat. 673;
Revised Statutes U. S. Sec. 2116; 25 U. S. C. A. Sec. 177;
Lane, Secretary of Interior v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113;
Borax Consolidated v. *Los Angeles,* 296 U. S. 10;
Leecy v. *United States,* C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed, 232 U. S. 731;
United States v. *Creek Nation,* 295 U. S. 103;
Pueblo of Santa Rosa v. *Fall,* 273 U. S. 315, 320-1;
18 *Opinions Attorney General,* 235;
United States v. *Carpenter,* 111 U. S. 347;
Leavenworth, et al. R. R. Co. v. *United States,* 92 U. S. 733.

II.

The Court erred as a matter of law in not holding that the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act herein and the filing of this suit by the Shoshone Tribe under said Act.

Same authorities as Number I.

III.

The Court erred in holding, as a matter of law, that the statute, 25 U. S. Code Annotated, Indians, Sec. 2, charging the Commissioner of Indian Affairs with the duty to manage all Indian Affairs, conferred power on said Commissioner to hold that the Arapahoes had equal rights to the land of the Shoshone's Treaty Reservation (Opin., R. 76-78); the duty to manage not being equivalent to authority to alienate the corpus of the Shoshone's property.

Same authorities as Number I.

IV.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Commissioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power on such Commissioner to alienate any interest in the Shoshone's Treaty lands in violation of the express provision of a later statute (R. S., Sec. 2116; Sec. 177, Title 25, U. S. C. A.) reading as follows:

> "SEC. 177. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Same authorities as Number I.

V.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Com-

missioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power upon said Commissioner to violate and nullify Article Eleven of the Shoshone's 1868 Treaty, reading as follows:

> "ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same;"

Same authorities as Number 1.

VI.

The Court erred in holding as a matter of law, in substance and effect, that the Commissioner of Indian Affairs had the right and power to determine that the Arapahoes had any rights to the land embraced within the Shoshone Treaty Reservation, in violation of the statutes of the United States relating to disposal of any interest in Indian Tribal Lands, under the findings of the Court of Claims that the Shoshone Tribe never consented to admit the Arapahoes amongst them on said Reservation as permanent occupants and that no legal consent, agreement, or contract, had ever been entered into between the Shoshone Tribe and the Arapahoe Tribe or the United States whereby the Shoshone surrendered any rights in and to said Reservation to the Arapahoes (Finding 10, R. 45, 48; Opin., R. 70).

Same authorities as Number I.

VII.

The Court erred as a matter of law, in allowing the Shoshones compensation, wholly inadequate, for the temporary

use and occupancy of the Reservation by the Arapahoes equally with the Shoshones and for the benefit and profit of the United States (Opin., R. 80-81), for only the period 1878 to 1891; the Court should have allowed the Shoshones compensation based on commercial value and profit to the United States and to the Arrapahoes for such temporary use and occupancy for the additional period 1891 to 1927, together with such additions thereto as may be required to produce the present full equivalent of such compensation paid contemporaneously with said temporary use and occupancy. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been addded (Finding 16, R. 53).

Authorities.

Johnson v. *United States,* 2 Ct. Cl. 391;
Johnson v. *United States,* 4 Ct. Cl. 248;
Pope v. *United States,* 26 Ct. Cl. 11;
Waite v. *United States,* 282 U. S. 508;
Phelps v. *United States,* 274 U. S. 341;
Jacobs v. *United States,* 290 U. S. 13.

VIII.

The Court erred in holding as a matter of law, in substance and effect, that the only effect of the Jurisdictional Act was to ratify a permanent taking in 1891 of an undivided half interest in the Shoshone Treaty Reservation (Opin., R. 77-78), when in law said Act, First, permitted the recovery of damages, if any, for the temporary use of an undivided half of said Reservation from 1878 to 1927 as under an implied lease; and, Second, provided that the decree of the Court should permanently take and cancel the Shoshone's treaty title to the Arapahoe allotments and to an undivided half interest in the unallotted tribal lands,

both provisions necessarily implying the constitutional right to just compensation.

Authorities.

Johnson v. *United States,* 2 Ct. Cl. 391;
Johnson v. *United States,* 4 Ct. Cl. 248;
Pope v. *United States,* 26 Ct. Cl. 11;
International Paper Co. v. *United States,* 282 U. S. 399;
Crozier v. *Fried-Krupp,* 224 U. S. 290.

IX.

The Court erred as a matter of law in failing to allow the Shoshones the just compensation required by the Fifth Amendment of the Constitution of the United States for the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of the Shoshone's Treaty Reservation, whether same occurred in 1891 or in 1927, in that the Court should have included in the judgment such addition to the value thereof at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously with the permanent taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been added.

Authorities.

United States v. *Creek Nation,* 295 U. S. 103;
Jacobs v. *United States,* 290 U. S. 13;
Seaboard Air Line R. Co. v. *United States,* 261 U. S. 299, 306;
Phelps v. *United States,* 274 U. S. 341;
Waite v. *United States,* 282 U. S. 508;
Yankton Sioux Tribe of Indians v. *United States,* 272 U. S. 351, 65 Ct. Cls. 423.

Summary of Argument.

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation for the use of the United States and the Arapahoe Tribe, or to destroy the corpus of the trust estate rather than administer the same.

2. The compensation allowed for the temporary use and occupation of the Shoshone's Reservation is inadequate, both as to time allowed for and amount thereof.

3. The permanent taking of an undivided half interest in the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act and the bringing of this suit thereunder, and not otherwise.

4. Just compensation requires that the Shoshones be awarded such sum, in addition to the value of the use, at the time of such use, and in addition to the value of the land at the time of annulling and cancelling the title, as will produce the present full equivalent of those values paid contemporaneously. Interest at a reasonable rate is a proper and convenient method to ascertain the amount to be added.

ARGUMENT.

Assignments of Error I to VI.

The first six assignments of error relate to the legal significance and effect attributed by the Court of Claims in its decision herein, to the letter and holding of the Commissioner of Indian Affairs of August 13, 1891, and to the manner in which Indian titles may be taken. Therefore, these six assignments of error will be considered together.

Following is a pertinent extract from the Special Findings of Fact (Finding 11, R. 50-51):

> "No definite action was ever taken by the officials of the Government with reference to the permanent settlement of the Arapahoes until August 13, 1891. Shortly prior to that date a commission, known as the 'Woodruff Commission,' had been sent to the Shoshone Reservation to negotiate for a cession of such portion of the Reservation as the Indians chose to dispose of. On August 5, 1891, the chairman of the Commission wrote the Commissioner of Indian Affairs asking for instructions as to how the Commission should treat with the Indians, inasmuch as Chief Washakie and the Shoshones denied that the Arapahoes had any rights to or upon the reservation. He stated that the Shoshones insisted that the Arapahoes came there merely as temporary visitors; that the claim of the Shoshones to the whole of the reservation was backed by Dr. James Irwin, who was present and discussed the matter of the presence of the Arapahoes with Chief Washakie and the Shoshones shortly before their arrival at the Shoshone Reservation in March 1878. In reply the Commissioner of Indian Affairs, on August 13, advised the Commissioner that 'this office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding.' This is the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe Band of Indians upon the Shoshone Reservation. Notwithstanding the continued protests of the Shoshones, the Woodruff Commission proceeded to counsel alike with the Shoshone and the Arapahoe Indians. The result of these negotiations will be further referred to hereinafter. The ruling made by the Commissioner of Indian Affairs on August 13, 1891, has ever since been enforced by the Interior Department. No action, ex-

cept the enactment of the Jurisdictional Act in this case, was ever taken by Congress with reference to the presence of the Arapahoe Indians upon the Shoshone Reservation."

The opinion states (R. 75-76):

"We are of opinion that the Government, through the Commissioner of Indian Affairs, who by statute was charged with the management of all Indian affairs and all matters arising out of Indian relations under direction of the Secretary of the Interior, and agreeably to such regulations as the President might prescribe, took from the plaintiff tribe an undivided one-half interest in all property and property rights to which they were entitled by law for the benefit of the Northern Arapahoe Indians; and that this action of the Government, acting through the Commissioner of Indian Affairs, occurred on August 13, 1891, when that official definitely held that 'this office holds that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones' (Finding 11). Prior to that time—that is, from the period March 18, 1878, until August 1891—the Arapahoes simply resided upon, used, and occupied the reservation equally with the Shoshones as a result of the errors and misunderstandings by the officials charged by law with the management of all Indian affairs as to the willingness and consent of the Shoshones to admit the Arapahoes amongst them, without any definite action having been taken in regard to the matter when the error was first called to the attention of the proper officials."

The opinion states (R. 78):

"For the reasons stated, it is our opinion that an undivided one-half interest in plaintiff's reservation was taken from them for the benefit of the Northern Band of Arapahoes on August 13, 1891, and that the

> plaintiff tribe is entitled to recover the value of an undivided one-half interest in the reservation on that date."

Petitioner respectfully submits that the Commissioner of Indian Affairs was without authority to divest the Shoshones of lands and rights in the reservation held by them under their Treaty of 1868. The opinion holds (R. 76-77), that by Sec. 2, U. S. Code Annotated, Title 25, the Commissioner of Indian Affairs, the official directly charged with the administration and management of all Indian affairs, is vested with authority and jurisdiction, by writing a letter, to take from the Shoshones their land and Treaty rights. It should be borne in mind that Sec. 2 of Title 25 giving the Commissioner of Indian Affairs the management of all Indian affairs, was the act of July 9, 1832 (4 Stat. 564). In 1834 Congress enacted R. S., Sec. 2116; Sec. 177, 25 U. S. Code Annotated, as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

In 1868 the Shoshone Treaty was made and was later duly ratified and proclaimed and became supreme law of the land. It provided, with respect to the lands on the Shoshone Reservation (Finding 2, R. 36):

> "ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in same."

The Shoshone Treaty also provided, Art. 2, that any other tribes which the Shoshones might be willing to ad-

mit amongst them could only be admitted "with the consent of the United States" (Finding 2, R. 33). Such consent could be given only by Congress.

It is respectfully submitted that the power and jurisdiction attributed to the Commissioner of Indian Affairs in the Court's decision herein is without support in, and is contrary to, the authorities.

Leecy v. *United States*, C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed on motion of Solicitor General, 232 U. S. 731.

Complainant, a Chippewa Indian, was entitled under Act of Congress to an allotment of land on the White Earth reservation. She selected and applied for a certain 80 acre tract chiefly valuable for pine timber growing thereon. The United States Indian Agent on the reservation had set the land apart as a sawmill reserve for general reservation purposes and for lumber to build houses for the Indians. The agent's action was approved by the Secretary of the Interior. The court said:

> "There is only one question in this case, and that is: Did the Indian agent or the Secretary of the Interior have any rightful authority to withdraw the land in question from allotment for the purposes set up in the answer. * * *
>
> "Section 441, Revised Statutes (U. S. Comp. St. 1901, p. 252):
>
> " 'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third—The Indians.'
>
> "Section 463, Revised Statutes, (U. S. Comp. St. 1901, p. 262):
>
> " 'The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may

prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.'

"None of these provisions conferred the power claimed. * * *

"Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations."

"A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so."

United States v. *Creek Nation,* 295 U. S. 103.

"But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane *v.* Santa Rosa, 249 U. S. 110 ,113; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307, 308." * * *

Borax Consolidated v. *City of Los Angeles,* 296 U. S. 10.

"'Of course,' said the Court in St. Louis Smelting & Ref. Co. *v.* Kemp, 104 U. S. 636, 641, 26 L. ed. 875, 876, 'when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed.' • • •

"Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers."

United States v. *Carpenter,* 111 U. S. 347.

"Syl. 1. Where land is reserved for the use of an Indian Tribe by treaty, it cannot be taken up, either by settlement or by location, under the Louisiana Agricultural College scrip."

"Syl. 2. The treaty is notice that the land will be retained by the Government for the use of the Indians, and this purpose cannot be defeated by the action of any officers of the land department."

Lane, Secretary of the Interior, v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113.

"The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States,—recognized as such by the legislative and executive departments,—and that in consequence the disposal of their lands is not within their own control,

but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendant in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States, and disposing of the same under the Public Land Laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership."

Pueblo of Santa Rosa v. *Fall*, 273 U. S. 315, 320-1.

In this case the Court held that a deed to lands belonging to an Indian village, executed by the captain of the village, was void because not executed as required by the Statute.

"Section 2116 declares that no 'conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. These sections apply here whether the Indians concerned are to be classified as nomadic or Pueblo Indians. United States *v.* Candelaria, 271 U. S. 432, 441, 442. None of their requirements can be dispensed with and it does not appear that in respect of most of them there was even an attempt to comply. See and compare, Green *v.* Menominee Tribe, 233 U. S. 558, 568; Lease of Indian Lands for Grazing Purposes, 18 Ops. Atty. Gen. 497. • • •"

18 *Opinions Attorney General*, 235-237.

" 'This statutory provision (R. S. 2116) is very general and comprehensive. Its operation does not de-

> pend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not, therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States. * * *'
>
> "'I submit that the power of the Department to authorize such leases to be made, or that of the President or Secretary to approve or to make the same, if it exists at all must rest upon some law, and therefore be derived from either a treaty or a statutory provision.'"

In 1896 Petitioner Indians ceded to the United States a tract of land in the northeast corner of the Reservation. Over the protest of the Shoshones the Arapahoes were permitted to participate in the council and to join in the cession agreement on condition that a provision protecting the Shoshone's treaty rights be inserted therein (Finding 14, R. 52). This agreement was ratified by Congress on June 7, 1897 (30 Stat. 62). Again in 1904 there was a cession of a portion of the Reservation and the representative of the United States met the same situation respecting the objections of the Shoshones to the presence of the Arapahoes and overcame same by inserting in the agreement a provision protecting the Shoshone's treaty rights. This agreement was approved by Congress March 3, 1905 (33 Stat. 1016) (Finding 15, R. 53).

From these findings by the Court it is manifest that Congress in 1897 and in 1905, by enacting the appropriate res-

ervations in each of said agreements, adhered to and preserved for the Shoshones all benefits to which they were entitled under their 1868 treaty stipulations. These acts of Congress were, respectively, six and fourteen years subsequent to the Commissioner's letter of 1891. The 1891 letter did not deter Congress from honoring and adhering to its solemn treaty stipulations and Congress continued so to do by the Jurisdictional Act of March 3, 1927, wherein it provided the manner and the method to acquire the title to an undivided half interest in the Shoshone's treaty reservation.

It is submitted that the foregoing authorities amply sustain the first six assignments of error. The "holding" of the Commissioner of Indian Affairs of August 13, 1891, was void and of no legal efficacy so far as concerned a permanent taking of any interest in the Shoshone Treaty Reservation lands. And that holding did not increase in legal power and efficacy with the passing years. It was just as void in 1927, when Congress enacted the Jurisdictional Act, providing for the cancellation of the Shoshone title by a suit under said act, as it was in 1891. The Act of 1927 and the suit thereunder passed the title.

Assignment of Error VII.

Accepting the authorities and law as to assignments of Error I to VI, viz., that there was no permanent taking until 1927, then it follows that assignment VII should be sustained, viz., compensation should be allowed for temporary use and occupancy from 1878 to 1927, instead of only from 1878 to 1891.

Johnson v. *United States,* 2 Ct. Cl. 391.

> Syl. VI. "The rule for the measure of damages for the temporary occupation of lands by the government is the value of such temporary occupancy at the time of entry, as though the claimant had leased and the

government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the government has the option of discontinuing the implied tenancy on any day or of continuing it indefinitely."

Johnson v. *United States*, 4 Ct. Cl. 248.

"Ejectment * * * does not lie against the Government. * * *

"But when, in an action in the nature of ejectment, the claimant's 'right of property' is established, the Government will be deemed to have entered as his tenant under an implied lease, whereof the 'just compensation' secured by the Constitution to those whose property is taken for the public use is the rent. * * *

"When the Government has entered upon land, and holds under an implied lease, the measure of the damages must be limited to the value of the occupancy, as though the claimant had leased and the Government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the Government holds the option of discontinuing the implied tenancy at any time, or continuing it indefinitely."

See also *Pope* v. *United States*, 26 Ct. Cl. 11.

It is further submitted that under the findings of the Court the award for temporary use and occupation is inadequate. In finding 16, R. 53, the value in 1891 of the undivided half interest in the reservation used by the Arapahoes is fixed at $2,050,597.50. For the use of this property the Shoshones are awarded $25,575 annually, which is at the rate of about 1¼% per annum of the value of the property used. The current, legal interest rate in Wyoming has never been less than 7%. An interest rate of only 4% annually on $2,050,000 would give an annual return of $82,000. For only the thirteen years mentioned in the finding this amounts to $1,066,000 instead of $332,475.

The Court, Opin., R. 81-82, holds that the Shoshones are entitled to damages for use and occupation of their reserva-

tion by the Arapahoes and that a reasonable allowance for such use and occupation is the sum of $25.00 per year for each Arapahoe. $25.00 per year per Indian is less than seven (7) cents a day for untrammeled use and occupation of over 2,000,000 acres of land, containing unlimited resources. Attention is especialy directed to the vivid description of this beautiful country, the home of the Shoshones, appearing in the Court's finding 5, R. 38-40. A few excerpts therefrom follow:

> "The plaintiff's reservation, set apart by the treaty of July 3, 1868, is located in the central-western part of Wyoming. * * * The reservation is protected from the elements by these two ranges of mountains; also by the Beaver Divide to the south. The ancient Indian name for the reservation is Warm Valley.
>
> "The reservation comprises the fairest and best-watered portion of the State of Wyoming. The character of the land ranges from precipitous mountains at the extreme north and west, down through heavily timbered upland, lower down through well-grassed bench land, to a series of river valleys with level, deep soil toward the eastern portion of the reservation * * * numerous fresh-water lakes well stocked with trout and waterfowl, and on whose banks live beaver, otter and other fur-bearing animals. The mountains contain more than 400,000 acres of spruce, pinon, hemlock, balsam, and yellow and white pine timber. The river valleys are level, easily irrigated, several miles in width, and contain a warm, rich, and productive soil. Stock lives the year around without other feed than being herded on the grasses growing from the mountain tops to the lowest valleys in greatest abundance, affording ample feed and range for livestock in the mountains in the summer season, and in the lower reaches of the reservation in the fall and winter seasons. The water is pure and the climate is mild and regular. The soil is rich and compares favorably in fertility to that of Illinois and Iowa. * * *

"The soil and climatic conditions on the reservation are well suited for the production of alfalfa, sweet clover, hard and soft wheat, oats, barley, corn, beans, peas, tomatoes, sugarbeets, garden vegetables, small fruits and melons. The land has a high average yield of crops.

"The reservation contained substantial deposits of coal, oil, gas, gypsum, and minerals. * * *

"The land on the reservation best suited for agricultural purposes lies toward the eastern portion thereof where the river valleys are wider, the soil deeper, and free from boulders, easy to irrigate, and nearer a railroad, and due to elevation, the growing season is from three to four weeks longer in the eastern portion of the reservation than in the western portion. The Arapahoes were placed on the eastern portion of the reservation. * * * Ample water is available to irrigate all agricultural land on the reservation. The reservation is supplied with sufficient water power for the production of water, electric light and power.

"At the time of the execution of the treaty of July 3, 1868, buffalo, elk, bear, antelope, deer and other wild animals suitable for food, were in great abundance on the reservation. Such game was native and indigenous to the mountains and valleys of the reservation and was found sufficiently adequate for subsistence of the Indians for many years. The plaintiff tribe of Indians went on annual hunts into the mountains for food, and the skins of certain wild animals were used for robes and other necessary uses for members of the tribe."

In the opinion (R. 79), the Court stated:

"It (Reservation) contained a large but undetermined quantity of oil and gas. * * * The oil and gas reserves alone were of great value in 1891. The Government for the purpose of this suit, fixed the 1926 present value of these reserves at $6,000,000."

At R. 82, the Court further stated:

"After they (Arapahoes) were placed upon the Shoshone Reservation in 1878, they used the same

> equally with the Shoshones by hunting, farming, pasturing their stock, building houses and fences, and sharing in the facilities of the agency and the employees provided by the Government for the Shoshone tribe'' (Finding 10, R. 50).

From the Court's description above noted, it must be conceded that the Shoshone Reservation was a most desirable country in which to live. It is unbelievable that for the mere pittance of less than seven cents a day allowed by the Court an Arapahoe Indian could have obtained anywhere in the United States the right and privilege to live on and roam over a tract of country, embracing over 2,000,000 acres, so generally desirable as is described above; to hunt in the mountains and fish in the streams to his heart's content; farm the land; pasture horses and cattle; cut timber for fires, homes, fences, corrals and teepee poles; cut and sell wood and hay to a Government military post (Finding 18, R. 54); obtain oil and coal for light and heat; gather fruits, berries, nuts, herbs, and vegetables; procure all the buffalo meat he could eat and sell what he could not dispose of; use or sell the hides, skins, robes, and horns; shoot all kinds of small game and share in the plentiful supply of antelope, deer, elk, bear, and other game animals and use the pelts, furs and skins for clothing and barter (Finding 5, R. 40). In short, all the wonderful resources of the Shoshone Reservation, affording an Indian subsistence, clothing, shelter and articles for barter, were at his daily disposal with little effort. There were ample resources of all kinds on the reservation—animal, vegetable, and mineral, as well as materials for shelter, warmth and comfort,—to supply all the requirements of the Indian mode of life and in addition furnish numerous articles of barter which brought cash money.

The Commissioner of Indian Affairs in his Annual Report for 1866, page 118, estimated the needs of the Pyra-

mid Reserve Indians for rations at 40 cents per day each; and in his report for 1869, page 246, he estimated the cost of subsistence of the Mescalero Apache Indians, consisting of full ration of beef and other necessaries, at approximately $60.00 a year per Indian.

The benefit accruing to the United States is an important element in fixing the value of the use and occupation. It largely benefited financially and otherwise by having placed the Arapahoes on the Shoshone Reservation. These Indians had proved a wily and rapacious tribe (Finding 8, R. 41-53; Opin., R. 82). Army officers protested against placing them on the Shoshone Reservation (Finding 10, R. 47). Had the Arapahoes not been placed on the Shoshone Reservation a separate reservation, promised them by treaty, would have been imperative which new reservation would have necessitated agency buildings, warehouses, mills, school houses, farmers, blacksmiths, teachers, physicians and other employes, and also additional appropriations for their support and maintenance (Finding 7, R. 41).

All the above items and the advantages accruing to the United States, it is submitted, should be taken into consideration in fixing a proper allowance for use and occupation. From a commercial standpoint it would have been impossible for a price of less than seven cents a day per Indian to have obtained the large and varied consideration furnished by the Shoshones to the Arapahoes and the Government; consequently justice requires that an allowance be granted commensurate with the value obtained from the Shoshones and enjoyed by the Arapahoes and the Government.

The Arapahoes had the use of the whole reservation in common with the Shoshones (Finding 10, R. 50), together with all its varied and valuable resources, and in addition thereto the advantages of the administrative, educational,

farming, and other facilities provided by the Shoshones (Opin., R. 82).

Present Full Equivalent Should Be Allowed.

In addition to proper compensation for the temporary use and occupancy from 1878 to 1927, there should be allowed such further amount as may be required to produce the present full equivalent of such compensation paid contemporaneously.

Phelps v. *United States,* 274 U. S. 341.

This was a case involving the question of compensation for the use of a pier, the lease on which was owned by plaintiffs. The use of the pier was requisitioned by the Secretary of War in 1917. The Court of Claims allowed compensation for the use, but disallowed the claim for additional amounts claimed as part of just compensation. This Court said:

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken."

In connection with the Phelps case it should be noted that the Secretary of War did not take the title to the pier, nor the title to an undivided half interest thereof. He took merely the *use* of the pier.

Waite v. *United States,* 282 U. S. 508.

This was a suit to recover for the unlicensed use of a patented invention. The opinion states:

> "The statute grants 'recovery of his reasonable and entire compensation for such use.' We are of opinion that interest should be allowed in order to make the compensation 'entire.' In addition to the purpose of the word adverted to in Richmond Screw Anchor Co. *v.* United States, 275 U. S. 331, 343, we cannot doubt that it was intended to accomplish complete justice as between the plaintiff and the United States."
>
> *Jacobs* v. *United States,* 290 U. S. 13.

> "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right.* It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. Title 28, Sec. 41 (20). * * * (Italics ours.)
>
> "The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' "

Assignment of Error VIII.

The language of the Jurisdictional Act is clear. It provides, Sec. 3 (R. 3):

> "In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property."

The foregoing contemplates two things. First, recovery for the damages, if any, for the temporary use of an undivided half of the Shoshones' reservation from 1878 to 1927. That use was an accomplished fact when the Jurisdictional Act was passed. Whether the Commissioner of Indian Affairs had the power and authority to temporarily use the Shoshones' reservation as a home for the wandering Arapahoes, or whether he enforced such temporary use unlawfully, at any rate he had done that very thing. So the fact of the use stood accomplished and Congress authorized suit for damages therefor.

But Congress recognized that whatever claims the Commissioner may have asserted as to permanently taking a half interest in the lands of the reservation were without foundation. He had no such power. Congress also recognized that permanent provision must be made for the Arapahoes, otherwise there would be a constant recurrence of the Shoshones' claim for temporary use and occupation. Therefore, Congress provided, second:

> * * * "the decree of the court shall * * * annul and cancel all claim, right, and title of the Shoshone Indians in and to such money, lands, or other property."

Unless Congress had recognized the distinction between damages for the temporary use, and compensation for the permanent taking, the words last above quoted are superfluous. Congress knew that nothing the Commissioner had done, or could do, could annul and cancel the Shoshones' Treaty title.

The Court of Claims, in rejecting plaintiff's contention above, statees (Opin., R. 78):

> "In *Crozier* v. *Fried, Krupp Aktiengesellschaft,* 224 U. S. 290, it was held that 'The adoption by the United States of the wrongful act of an officer is of course an

> adoption of the act when and as committed and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.' In that case the court was construing the act of 1910 authorizing suits against the United States for patent infringement, and the issue involved a patent which had been used without permission of the owner by an officer of the United States prior to the passage of that act."

It is respectfully submitted that the analogy fails. In the *Crozier* case, neither General Crozier nor the Government ever claimed to take title to the Fried-Krupp patent. They simply *used* it, temporarily, in furtherance of the business of the United States, viz., the manufacture of guns, just as the Indian Office *used* the Shoshones' Reservation temporarily in furtherance of the desire and duty to provide facilities for the Arapahoes. There was no attempt to take the title to the patent away from Fried-Krupp. The language of the opinion of this Court is clear. It quotes the Statute, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims." * * *

The opinion then continues:

> "The text of this statute leaves no room to doubt that it was adopted in contemplation of the contingency of the assertion by a patentee that rights secured to him by a patent had been invaded for the benefit of the United States by one of its officers; that is, that such officer, under the conditions stated, had infringed a patent."

At numerous other places in the opinion are clear indications that what this Court was considering was only the *use* of the Fried-Krupp patent, and that the adoption by the United States of General Crozier's *use* was an adoption of such act when and as committed. In the instant case the United States has adopted the act of the Indian Office in *using* the Shoshone Treaty lands. But Congress went a step further and provided for permanently acquiring title thereto.

The Johnson and Pope cases in the Court of Claims, cited *supra* under VII, are clear as to the nature of the temporary use and occupancy of the Shoshone's Reservation up to the date of the Jurisdictional Act and this suit thereunder.

Assignment of Error IX.

Petitioner submits that just compensation includes such addition to the value of the property at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously. The *Phelps* and *Jacobs* cases, cited under Assignment VII, *supra,* are conclusive on this point. They are referred to in the foot notes to the recent case of:

United States v. *Creek Nation,* 295 U. S. 103.

> "But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here."

The Court of Claims in its order of June 1, 1936 (R. 99), states:

> "If the court had been dealing with similar questions between private parties or between the Government and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

Indians are citizens of the United States, such citizenship having been conferred by the Act of Congress of June 2, 1924 (43 Stat. 253). See 4 Kappler, 1165.

By the General Allotment Act of Feb. 8, 1887, Sec. 6 (24 Stat. 388), Congress declared that Indians so allotted shall become citizens of the United States and of the State in which they reside.

Indians and Indian tribes come within the protection of the Constitution. In *United States* v. *Creek Nation, supra,* this Court stated:

> "While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane *v.* Pueblo of Santa Rosa, 249 U. S., 110-13; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307-8."

See also *Cherokee Nation* v. *So. Kans. R. R. Co.,* 135 U. S. 641; *U. S.* v. *Mille Lac Band of Chippewa Indians,* 229 U. S. 498, holding that property of Indian tribes comes within the rule of just compensation.

It would appear that as guardian of the Indians, both as individuals and as tribes, the United States is more

strictly obligated to act justly toward the Indians than in similar cases of whites against the Government where such guardianship does not exist. This thought is cogently expressed by the Supreme Court in *Choctaw Nation* v. *United States*, 119 U. S. 1:

> "The recognized relation between the parties to this controversy is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exercised by the strong over those to whom they owe care and protection. The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

The Court of Claims states (R. 78):

> "Moreover, the rules with reference to condemnation proceedings and the taking of private property for public use are not entirely applicable to cases such as the one at bar. The Indian tribes were under the control, care, and protection of the United States and although they could not legally be deprived of any property secured to them by treaty, agreement or act of Congress, the legal title to lands embraced in reservations set apart for the absolute and undisturbed use and occupancy of Indians remained in the United States."

There is no logical reason to discriminate against Indian tribes as compared with private parties merely on the ground that the naked legal title resides in the United

States. It is well known that such legal title was retained solely so that it should not pass into foreign hands. As said by the Supreme Court in *Leavenworth L. & Co.* v. *United States*, 92 U. S. 733,

> "As long ago as in Cherokee Nation vs. Georgia, 5 Peters 1, this court said that the Indians are acknowledged to have the unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, United States *v.* Cook, 19 Wall. 591, this right of occupancy has been said to be sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier. * * * This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere*. For all practical purposes, the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interferred with it, violated the guarantees under which they had lived since that date."

The cases of the Yankton Sioux Tribe of Indians in the Court of Claims and the Supreme Court of the United States are applicable to the situation here presented.

Yankton Sioux Tribe of Indians v. *United States*, 61 Ct. Cls. 40.

The Indians sought to recover for the value of the Pipestone Quarries, 648 acres of land in Minnesota, alleging

their ownership and claiming that the Government had wrongfully taken the lands. The Court of Claims found that the quarries were and ever had been open to the Indians to procure pipestone; that they had been deprived of no rights, and dismissed the petition. The decision of the Court of Claims was reviewed by the Supreme Court on certiorari in:

Yankton Sioux Tribe of Indians v. *United States,* 272 U. S. 351.

The Supreme Court reversed the decision of the Court of Claims stating:

> "It is quite clear from all the surrounding circumstances that the Indians understood that by this provision there was granted to them full ownership of the tract; and their claim to that effect they have always persistently and stoutly maintained."

After the reversal the case was disposed of in the Court of Claims in *Yankton Sioux Tribe of Indians* v. *United States,* 65 Ct. Cls. 428. In the body of the opinion the court recites the history of the case, the previous decision in 61 Ct. Cls. 40, and the reversal of that decision by the Supreme Court, stating:

> "The judgment dismissing the petition was reversed by the United States Supreme Court, 272 U. S. 351, 359, that court holding 'That the United States has taken and holds possession of the entire quarry tract of 648 acres * * * and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.'"

The finding and decision state:

> "Finding VIII. The market value of the Pipestone reservation in February, 1891, taking into considera-

tion its value for grazing and agricultural purposes, the value of its mineral rights, and its historical value, was $100,000.

"The Court decided that plaintiffs were entitled to recover as just compensation for the taking of the Pipestone Reservation $100,000 with interest from March 1, 1891, until paid."

Conclusion.

It is submitted that the foregoing facts and authorities establish that:

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation.

2. The compensation allowed for the temporary use and occupation is inadequate.

3. The permanent taking occurred in 1927; and

4. Such amounts must be added to the value of the use and to the value of the undivided half interest as will produce the present full equivalent paid contemporaneously.

Finally, let it be remembered, the Shoshones have ever been loyal and friendly to their Government and its citizens (Finding 4, R. 36-37).

"Their attitude toward the Government and its officers was always one of fullest cooperation and they always faithfully fulfilled their agreements and promises * * * he (Chief Washakie) and the members of his tribe implicitly trusted the Government not to overreach them * * * have been at peace with the the whites since they first encountered Lewis & Clarke in 1805 * * * Washakie took a large war party of the Shoshones across Big Horn Mountain as an ally of the United States to assist General Crook in his campaign against the Sioux on the Rosebud in 1876,

> and at other times furnished soldiers to aid the United States Army in its wars with Indians such as the Sioux, the Arapahoes and the Cheyennes. * * * In many instances the Shoshone Indians furnished aid and comfort to the white emigrants passing through their country on the Oregon Trail and assisted in protecting the whites from hostile Indians."

It is this simple, friendly, faithful people who now ask only for just compensation. Many of the wrongs they have suffered can never be redressed. Their diversified farm home has been broken up and they have been crowded back to the uplands, to the lighter soil and the boulders, while the Arapahoe intruders enjoy the fertile lower river valleys. They have had an alien enemy quartered on their lands, with all the attendant dread of savage methods of Indian warfare. Such elements of damage are not compensable in this case yet when, after all of these years, justice is meted out to the Shoshones it is submitted that it should be measured with no niggardly and reluctant hand. Let it be that just compensation which should flow from a rich and powerful nation dealing with a weak, untutored but trusting and ever loyal friend.

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,
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CHARLES J. KAPPLER,
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